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No. 10-1035

Supreme Court, U.S.
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In the Supreme Court of the United States

Kevin Loye, Gina Gist, Vikki Marshall, David Stiles,

Petitioners,

v.

County of Dakota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Facts Relevant to the Petition

A. Response to Mercury Spill on September 6, 2004.

On September 6, 2004, at approximately 6:46 p.m., the Rosemount Police Department received a report that two boys were playing with a suspicious material in the Rosemount Woods Manufactured Home Community (Rosemount Woods). Rosemount Woods is located in the City of Rosemount, County of Dakota, State of Minnesota. A Rosemount police officer went to the scene to investigate and in doing so, believed the suspicious material to be mercury. The officer reported her findings to on-duty sergeant Jewell Erickson who then responded to the scene. The Rosemount Fire Department also responded to the scene. Sergeant Erickson was the incident commander for police operations and Rosemount Fire Department Assistant Chief Haeg was the incident commander for fire operations. Rosemount officers went door-to-door seeking to identify individuals and property that may have been contaminated. The Petitioners were among a large group of Rosemount Woods residents, including hearing, deaf, and Spanish speaking residents, identified as possibly being contaminated.

Petitioners Loye and Gist, along with their son Cory resided in a home together in Rosemount Woods. Loye and Gist are deaf. Loye and Cory were directly exposed to the mercury.

Petitioner Marshall, her minor children Cassie and Timothy, Marshall's boyfriend Jeff Beaman, Beaman's minor son, and Bruce Einarson resided in a home together in Rosemount Woods. At the time,

Petitioner Stiles resided in Shakopee, Minnesota, but had been staying as a guest at the Beaman/Marshall residence for a few days prior to the incident. Marshall, Einarson, and Stiles are deaf; Beaman is hearing. Cassie was directly exposed to the mercury because the boys poured some on top of her head. Marshall and her son also had direct contact with the mercury.

Because mercury is a hazardous material, the City requested assistance from several other agencies. Specifically, at approximately 7:12 p.m., Sergeant Erickson called the Minnesota Duty Officer, the St. Paul Fire Department Chemical Assessment Team, the Minnesota Pollution Control Agency (MPCA), the United States Environmental Protection Agency (EPA), the National Response Center, the Minnesota Department of Health, and Regions Medical Center. The St. Paul Fire Department Chemical Assessment Team and MPCA representatives responded to the scene. At approximately 9:00 p.m., the City requested assistance from the Special Operations Team (SOT).

B. Dakota County Domestic Preparedness Committee and the SOT.

In September 2003, Dakota County and 11 municipalities located in Dakota County executed a joint powers agreement (JPA) pursuant to Minn. Stat. § 471.59 for the creation of the Dakota County Domestic Preparedness Committee. (Committee). The stated purpose of the JPA is to "provide joint exercise of the parties' powers to plan for and respond to the need of first responders for special response operations caused by the occurrence of large-scale disasters or emergencies." The primary duty of the

Committee is to establish and oversee a Special Operations Team (SOT).

The Committee established a SOT in accordance with the JPA. The SOT is a group of individuals who work in the areas of law enforcement, fire, or emergency management services and are employed by the parties to the JPA. SOT members are trained to conduct special rescue operations and are a resource tool for the parties to the JPA as well as non-member organizations. The SOT is not a first responder organization.

As part of its structure, the SOT has a team leader who is selected by SOT members. Mike Pott, fire captain with South Metro Fire[1] is the current SOT team leader and was the team leader at the time of the incident. At the time, there were approximately thirty-two (32) SOT members.

To seek the assistance of the SOT, the requesting community (host community) requests that the SOT be called out. By the terms of the JPA, whether the SOT shall provide such assistance and the extent of such assistance is determined solely by the SOT team leader – in this case, Mike Pott. Dakota County does not have the authority to direct the SOT to respond to an incident (i.e., mobilize). When it is determined that the SOT will respond, all SOT members receive a page advising them to report to a staging area within the host community. When the SOT arrives at the staging area, the team leader communicates with the host community's incident commander to learn more about the nature of the emergency and to determine what aid the host

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[1] The South Metro Fire Department is a joint powers organization comprised of the Cities of West St. Paul and South St. Paul that was established in 2008. Prior to that time, Pott was employed by the West St. Paul Fire Department.

community is seeking from the SOT. The SOT team leader places himself under the command of the host community incident commander.

C. SOT Responds to the Scene on September 6, 2004.

At approximately 9:00 p.m., the City requested the assistance of the SOT. The SOT responded to the mercury spill incident and arrived at the staging area at approximately 9:30 p.m. SOT team leader Pott and nineteen (19) other members of the SOT responded. Upon his arrival, Pott met with the Rosemount Fire Department incident commander and the team leader for the St. Paul Fire Department Chemical Assessment Team. The Rosemount Fire Department incident commander assigned the SOT the task of decontaminating individuals who were believed to have been exposed to the mercury. The SOT, with the assistance of the Inver Grove Heights Fire Department,[2] set up a decontamination line and decontaminated forty-nine (49) people. The individuals went through the decontamination as family units. The decontamination process started at approximately 11:11 p.m. and was completed at 2:00 a.m. on September 7th. At the time of this incident, there were no County employees that were on the SOT and no County employees participated in the decontamination process.

D. September 7, 2004.

In the early morning hours of September 7th, those individuals required to go through the decontamination process were subsequently

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[2] The Inver Grove Heights Fire Department provides assistance to the SOT in emergency situations requiring decontamination.

transported by bus to an emergency shelter. (i.e., the AmericInn located in Apple Valley, Minnesota). This included the Petitioners. Emergency shelter was necessary until it could be determined that homes were free from contamination. The American Red Cross was responsible for obtaining this initial emergency shelter. Twelve (12) homes, including the Beaman/Marshall and Loye/Gist homes were declared to be public health nuisances due to mercury contamination. Entry to the homes was restricted and inhabitation of the homes was prohibited pending cleanup under the direction of the MPCA.

September 7th is the first date on which Dakota County had any involvement in the mercury spill incident. This involvement came in the form of assistance to be provided by the Dakota County Department of Public Health (Public Health). Public Health was requested to take the lead in addressing public health issues and housing issues for the displaced households. On the evening of September 7th, the City of Rosemount hosted a meeting in the lobby of the AmericInn for the displaced households. Lieutenant Kuhns of the Rosemount Police Department spoke at the meeting and explained how the displaced residents could retrieve needed items from their respective homes. Kathy Wick, a Public Health supervisor, also spoke at the meeting. Earlier on September 7th, the American Red Cross made Public Health aware that some members of the displaced group were deaf and that some spoke Spanish. Accordingly, the necessary interpreters were obtained and were utilized for the meeting, including an American Sign Language (ASL) interpreter.

Immediately following the meeting, Wick spoke with Petitioners Loye and Gist using the same ASL

interpreter who provided services during the meeting. During this conversation, Gist expressed her unhappiness about the decontamination process. In response, Wick expressed her empathy and again explained some of the housing matters that were discussed during the larger meeting. Wick also spoke with Petitioner Marshall following the meeting and utilized the interpreter. The primary topic of this conversation was Marshall's daughter Cassie and the need for the child's hair to be retested and shampooed again.

E. **September 8, 2004.**

On the afternoon of September 8th, an internal meeting was held at Public Health which was attended by several Public Health employees, including Wick, several public health nurses, and Jon Springsted. Springsted is an environmental health specialist. One of the public health nurses in attendance was Gerilee Greeley. At this meeting, Wick advised the attendees about the mercury incident, that residents had been displaced, and that the American Red Cross was no longer going to shelter the residents. The public health nurses were each assigned several of the displaced households. The nurses were to follow up with the households on any public health needs related to the incident. In addition to other households, Greeley was assigned the Loye/Gist and Beaman/Marshall households. During this meeting, Greeley was advised that certain members of her caseload were deaf.

1. Meeting at AmericInn.

Following the internal Public Health meeting, Springsted and the assigned public health nurses went to the AmericInn to speak to the displaced

residents. The purpose in doing so was to communicate to them what was happening with their homes and to answer any public health related questions. Springsted made arrangements for an ASL interpreter to be present.

Springsted went to the AmericInn and spoke to several people. While there, he spoke to Petitioners as a group and used the interpreter in doing so. Springsted spoke to Petitioners for approximately thirty (30) minutes and discussed several topics including: (1) the contamination of the homes; (2) what was being done to decontaminate the homes; (3) the monitoring of the homes that would be conducted; and (4) that the homes would be cleared for reoccupation when it was believed that the levels of mercury were safe for people.

Greeley also went to the AmericInn the afternoon of September 8th. While there, Greeley met with Loye and Gist. An interpreter was utilized for this meeting. During this meeting, Gist expressed how upset she was with the decontamination process on September 6th. In addition, Loye advised Greeley that he was without his heart medication.

2. Community Meeting at Rosemount Community Center.

On the evening of September 8th, the City of Rosemount hosted a community meeting at the Rosemount Community Center. An ASL interpreter was retained and provided services for the meeting. Following the community meeting, there was a short meeting at the same location for the displaced residents. The same ASL interpreter was utilized for this small group meeting. Greeley was present at the Rosemount Community Center the evening of September 8th. Greeley met briefly with Loye to

deliver heart medication to him that she had obtained on his behalf. Greeley used an interpreter in communicating with Loye on this occasion because she needed to explain to Loye that he needed to see his doctor before the doctor would approve any future prescription renewals. Greeley also met with Marshall and Beaman. Greeley used an interpreter for this meeting. During this meeting, the conversation focused on Marshall's daughter Cassie and whether Cassie had undergone some necessary blood work. During this meeting, Greeley advised Beaman and Marshall that she would be picking up Cassie's urine collection jug[3] the following day at 10:00 a.m.

F. <u>September 9, 2004</u>.

On the morning of September 9th, a meeting was held at the AmericInn to discuss the relocation of the displaced households to Homestead Suites in Eagan, Minnesota. There was an ASL interpreter utilized for this meeting. Greeley was present for the meeting. While there, she met with Loye and Gist. Greeley used an interpreter for this individual meeting. Several topics were discussed during this individual meeting including the fact that the Loye/Gist household would be relocating to Homestead Suites that afternoon. In addition, while there, Greeley picked up Cassie's urine collection jug. Greeley received the jug from Beaman and had no contact with Marshall on this occasion.

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[3] Cassie's urine had to be collected for a 24-hour period for testing.

G. September 10, 2004.

On the morning of September 10th, a community meeting was held at the Eagan Community Center. An ASL interpreter was utilized for this meeting. Greeley attended this meeting and while there, she met with Loye and Gist and used the interpreter in doing so. Greeley also met with Marshall and used the interpreter in doing so.

H. September 11, 2004.

On the morning of September 11th, a meeting was held at Homestead Suites to discuss general mental health issues. An ASL interpreter was utilized for this meeting.

I. **Public Health Contacts with Marshall after September 10, 2004.**

The Beaman/Marshall home was cleared for re-occupancy on September 9, 2004, and the household members returned to the home on that date. Public Health had the following contacts with Marshall after September 10, 2004:

1. September 16, 2004. Greeley went to the Beaman/Marshall residence. The purpose of the visit was to drop off a community resource list and complimentary passes to the Minnesota Zoo and IMAX Theater. Both Beaman and Marshall were present. Greeley did not use an interpreter on this occasion.

2. September 17, 2004. The United States EPA contracted with Tetra Tech., Inc. to perform all air sampling of the contaminated homes. On this date,

Springsted accompanied the contractor to the Beaman/Marshall residence to observe the contractor conduct additional sampling. Marshall was present in the residence during the testing, but Springsted does not recall speaking with her. No interpreter was present on this occasion.

3. September 27, 2004. Greeley went to the Beaman/Marshall residence to check in to see how they were doing. Greeley did not use an interpreter on this occasion. When Greeley arrived, she had contact with Marshall. Marshall was crying and communicated to Greeley that she was upset because Beaman was moving out of the home. Greeley provided Marshall with the TTY number for the Dakota County Crisis Response Unit and encouraged her to call if she continued to be upset. During this visit, Greeley also informed Marshall that her daughter's blood and urine levels for mercury were normal.

Greeley's visit to the Beaman/Marshall residence on September 27th was the last contact Public Health had with Marshall. On those occasions when Public Health communicated with Marshall without the use of an interpreter, at no time did Marshall indicate that she could not understand what was being communicated to her nor did Marshall ever request that an interpreter be utilized.

J. Public Health Contacts with Loye/Gist after September 10, 2004.

Public Health had the following contacts with Loye and Gist after September 10, 2004:

1. September 13, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist. At this point, Loye and Gist no longer had any public health needs and were only at the hotel waiting for their home to be cleared for re-occupancy. Greeley did not use an interpreter on this occasion because she was simply checking in with people rather than conveying any important information. Greeley communicated with Loye and Gist using notes. During this meeting, it was agreed that Greeley could communicate with Loye and Gist via email.

2. September 14, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist. No interpreter was used on this occasion.

   A meeting had been scheduled for the MPCA to meet with Loye and Gist on this date. The MPCA requested that Springsted arrange for an interpreter to be present. Springsted passed this request on to Greeley. Greeley was unable to obtain an interpreter for

September 14th, so the meeting with the MPCA was rescheduled to September 15th. Greeley arranged for an interpreter for the September 15th MPCA meeting and notified Loye and Gist by email of the new date and time for the meeting.

While at Homestead Suites on September 14th, Greeley reminded Loye that he needed to make an appointment with his doctor before Loye could receive any additional heart medication. Greeley agreed to make the appointment for Loye. Greeley made the appointment and emailed Loye with the appointment date and time. Loye emailed Greeley acknowledging receipt of Greeley's email. Greeley confirmed in her progress notes that the clinic would provide an interpreter for Loye's appointment.

3. September 15, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist and reminded them of their meeting with the MPCA that day. Loye and Gist told Greeley they planned on attending the meeting. No interpreter was used on this occasion. Greeley communicated with Loye and Gist by writing notes.

Later that same day, Greeley returned to Homestead Suites. While there she delivered to Loye and Gist a

check in the amount of $150.00 from the Rosemount Lions Activity Fund. No interpreter was used on this occasion.

4. September 16, 2004. Greeley went to Homestead Suites to check on the displaced households she had been assigned. While there she checked in with Loye and Gist and reminded Loye of his doctor's appointment scheduled for that day. Loye indicated that he was going. No interpreter was present on this occasion. Greeley communicated with Loye and Gist by writing notes

In the early evening hours, Greeley returned to Homestead Suites and provided Loye and Gist with written instructions for *Carpet Replacement Procedure.* Greeley agreed to make an appointment for Loye and Gist at Abbey Decorating to select new carpet for their home. Loye told Greeley that he would prefer an appointment date of September 20th after 11:30 a.m. No interpreter was used on this occasion. Greeley communicated with Loye and Gist by writing notes.

5. September 17, 2004. Greeley made an appointment for Loye and Gist at Abbey Decorating for September 20th. Greeley emailed Loye and Gist with the appointment date and time.

6. September 20, 2004. Greeley emailed Loye and Gist reminding them of their appointment at Abbey Decorating on

that date. Loye responded to the email indicating that they would be attending the appointment. Later that same day, Greeley emailed Loye and Gist that their home had been cleared on that date for re-occupancy and that they could move back in after new carpet had been installed. Loye responded to this email on that same date.

7. September 21, 2004. Greeley emailed Loye and Gist that they should plan on checking out of Homestead Suites by 11:00 a.m. on September 23rd and returning home. In this email, Greeley also advised Loye and Gist that she would be stopping by Homestead Suites the following morning (i.e., September 22nd) at approximately 9:00 a.m. to provide them with some written instructions.

8. September 22, 2004. Greeley went to Homestead Suites to check on the displaced households still remaining. While there she met with Loye and Gist to provide them with *Instructions for Re-Occupation of Home* as mentioned in her September 21st email. No interpreter was present on this occasion. Greeley communicated with Loye and Gist by using written notes. Loye and Gist returned to their home on September 23rd.

9. September 27, 2004. Greeley received an email from Loye indicating that their

television was not working. Greeley responded to the email and again provided Loye with contact information to request financial assistance. Later that day, Greeley went to the Loye/Gist home to check in to see how they were doing. No interpreter was used on this occasion. Greeley communicated with Loye and Gist by using written notes. In addition, Loye voiced with Greeley. During this visit, Gist expressed her pleasure with the new carpet; they advised Greeley that the television was not working; and Loye had questions about what damage would be covered by his insurance. Greeley agreed to schedule a meeting on their behalf with the Rosemount Community Action Council. Loye and Gist expressed a preferred meeting date of September 29th in the morning.

10. September 28, 2004. Following her visit with Loye and Gist on September 27th, Greeley contacted the Rosemount Community Action Council several times and was finally able to schedule a meeting for Loye and Gist on September 29th. Greeley emailed Loye and Gist advising them of the date and time of the meeting.

The September 28th email from Greeley to Loye and Gist was the last contact Public Health had with Loye and Gist. On those occasions when Greeley communicated with Loye and Gist

without the use of an interpreter, at no time did Loye and Gist indicate that they could not understand what Greeley was communicating nor did Loye and Gist ever request that an interpreter be utilized.

K. Public Health Contact with Stiles.

Public Health had minimal contact with Stiles. Stiles was identified as being a guest at the Beaman/Marshall household, but was not identified as needing any public health services. Greeley did not have any communication with Stiles except to send him a release of information request so that Stiles could receive money from the Rosemount Lions Activity Fund. The only contact Springsted had with Stiles was the afternoon of September 8th when Springsted went to the AmericInn to meet with the displaced households. On that occasion, Springsted met with the Petitioners as a group and used an ASL interpreter. According to Marshall, Stiles had no contact with the mercury and returned to his own residence in Shakopee on September 9, 2004.

II. Procedural History

Approximately one year after the incident, each Petitioner filed a charge with the Minnesota Department of Human Rights (MDHR) naming Public Health as the Respondent. Each Petitioner alleged that Public Health violated the Minnesota Human Rights Act (MHRA) by engaging in an act of discrimination by not providing them with ASL interpreters during the evacuation and decontamination process, during the period when Petitioners were relocated to a hotel, during follow-up home visits and during some of the public meetings

concerning the contamination. The MDHR Commissioner dismissed the Petitioners' charges of discrimination.

Petitioners also filed the same charges with the MDHR against the City of Rosemount, the American Red Cross, and the Minnesota Pollution Control Agency. The MDHR found probable cause on the charges filed against these entities.

On January 19, 2007, Petitioners filed suit against the Respondent in the United States District Court of Minnesota alleging that the Respondent violated Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 504 of the Federal Rehabilitation Act, 29 U.S.C. § 794, and the Minnesota Human Rights Act, Minn. Stat. § 363A.12. Petitioners filed an Amended Complaint on January 23, 2007, alleging the same violations. On February 3, 2009, the Respondent filed a motion for summary judgment and a motion for sanctions against Petitioner Stiles. By an order dated August 25, 2009, the Honorable James M. Rosenbaum granted the Respondent's motions. Petitioners appealed the district court's grant of summary judgment to the Eighth Circuit Court of Appeals. In an opinion filed on November 17, 2010, the Eighth Circuit affirmed the district court's grant of summary judgment.

On January 30, 2009, Petitioners served a state Complaint on the City of Rosemount, the American Red Cross, and the State of Minnesota alleging violations of the MHRA, which mirror those alleged by Petitioners in their lawsuit against the Respondent. The lawsuit is venued in Ramsey County, Minnesota.

ARGUMENT

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD.

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eighth Circuit's November 17, 2010, Opinion ("Opinion") is in conflict with a decision of this Court or another court of appeals or that the Eighth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c).

In their lawsuit, Petitioners maintained that they did not receive effective communication during: (1) the decontamination process; (2) large group meetings; and (3) individual meetings with the public health nurse. As to the decontamination process, the Eighth Circuit held that the Petitioners failed to prove that the Respondent was responsible for interpreters not being present. (Pet. App. at A-7). Accordingly, for purposes of the Petition, only the large group and individual meetings are at issue.

As to the large group meetings, the Respondent clearly established that it provided ASL interpreters for each large group meeting. This fact was supported by Petitioners Loye and Gist who testified during their depositions that an ASL interpreter was present for each large group meeting. (Pet. App. at A-8). Nonetheless, in a desperate attempt to create a genuine issue of material fact, Petitioner Marshall argued that there was not an ASL interpreter provided for two large group

meetings.[4] As to the individual group meetings, Petitioners Marshall, Loye and Gist claimed that they did not receive effective communication and that as a result, did not receive the full benefit of the information that was being conveyed during the meetings.

On appeal, Petitioners argued that 28 C.F.R. § 35.160 required the Respondent to use an ASL interpreter each time it communicated with the Petitioners, without exception. (Pet. App. at A-9). The Eighth Circuit disagreed finding that Title II of the ADA did not demand compliance with Petitioners' literal reading of the regulation. (*Id.*). The court held that the legal standard is "effective communication that results in meaningful access to government services." (Pet. App. at A- 9 to A-13). The court's holding is in accord with Title II of the ADA , the regulations implementing it and applicable case law.

The ADA requires that qualified individuals receive "meaningful access" to programs and activities. *Randolph v. Rogers, 170 F.3d 850, 858 (8th Cir. 1999)* (citations omitted). The Department of Justice regulations implementing Title II of the ADA provide that public entities must "take

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[4] The only evidence offered on this point was the affidavit testimony of Marshall. According to Marshall, there was no interpreter provided for a large group meeting that allegedly occurred on the morning of September 8th and a large group meeting that allegedly occurred on September 15th. The evidence presented below established that there were no large group meeting on the morning of September 8th and there was no large group meeting on September 15th. The large group meeting that was held on September 8th was conducted in the evening. There was a meeting on September 15th, however, it was an individual meeting between the Minnesota Pollution Control Agency and Petitioners Loye and Gist.

appropriate steps to ensure that communications with . . . members of the public with disabilities are as effective as communications with others." *Bircoll v. Miami-Dade County, 480 F.3d 1072, 1082 (11th Cir. 2007) quoting 28 C.F.R. § 35.160(a).* Such steps may include furnishing appropriate auxiliary aids and services, which for deaf persons includes:

> Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devises for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

28 C.F.R. § 35.104(1) (2011). The regulations also provide that a public entity must give primary consideration to the request of the individual with disabilities when determining what type of auxiliary aid and service is necessary. *Bircoll, 480 F.3d at 1082, citing 28 C.F.R. § 35.160(b)(2).* However, when giving primary consideration to the individual's request, a public entity is not required to provide exactly what is requested if it can demonstrate that another effective means of communication exists. *28 C.F.R. Pt. 35, Appendix A, comments to 35 C.F.R. § 35.160.*

In determining what constitutes an appropriate auxiliary aid or service, consideration

must be given to the context. *Id.* As noted by the *Bircoll* Court:

> In many circumstances, oral communication plus gestures and visual aids or note writing will achieve effective communication. In other circumstances, an interpreter will be needed. There is no bright-line rule, and the inquiry is highly fact-specific.

Bircoll, 480 F.3d at 1087. Factors to be considered in determining whether an interpreter is required include: (1) the context in which the communication is taking place; (2) the number of people involved; and (3) the importance of the communication. *28 C.F.R. Pt. 35, Appendix A, comments to 28 C.F.R. § 35.160.*

Petitioners contend that the Eighth Circuit held that the ADA does not require compliance with the "effective communication" standard set forth in 28 C.F.R. § 35.160 and that by its refusal to give deference to the regulations, the Eighth Circuit has created a division in the court of appeals on whether the regulations should be given deference. Petitioners have misstated the Eighth Circuit's holding. Contrary to Petitioners' argument, in issuing its Opinion, the Eighth Circuit clearly recognized the "effective communication" standard and also took into consideration the comments to the regulations as well as applicable case law. Rather than ignore the regulations as argued by Petitioner, the Eighth Circuit simply disagreed with Petitioners' interpretation of the regulations.

The Eighth Circuit Opinion does not conflict with a decision of this Court or any court of appeals nor does it implicate a federal question that has not

been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any compelling reasons for the Petition to be granted.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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